United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1013

To be argued by
JOHN H. DOYLE, III

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

KIM CRANSHAW,
Defendant-Appellant.

On Appeal from the United States District Court, Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

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THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in admitting into evidence testimony and photographs of certain alleged similar acts where such evidence, although based upon defendant's admissions, was uncorroborated and its probative value was far outweighed by its prejudicial effect?

2. Did the District Court's charge to the jury that defendant could be found guilty on all counts if he were a member of a "criminal joint venture," where conspiracy was not charged in the indictment and without having raised this theory of criminal liability prior to the time it was charged, so prejudice the defendant by preventing his counsel from addressing this issue by way of cross examination and summation, that it constituted reversible error?

Statement of the Case

Defendant Kim Cranshaw ("defendant") appeals from a judgment of conviction entered on December 17, 1976 on three counts charging, respectively, bank robbery, armed bank robbery and carrying a firearm in the commission of a felony.

A complaint was filed against and a warrant issued for the arrest of the defendant on September 30, 1976. Indictment No. 76 Cr. 967 was filed against defendant and one

co-defendant, Walton Claxton, on October 15, 1976. A hearing on defendant's motion to suppress certain evidence was held before the Hon. Lloyd F. MacMahon on November 9, 1976. In a memorandum decision dated December 1, 1976, Judge MacMahon denied defendant's motion. The case was tried against defendant and Claxton on November 29 and 30 and December 1 and 2, 1976 before Judge MacMahon and a jury, resulting in a verdict of guilty as to defendant on each of the three counts. The defendant Claxton was acquitted on all three counts. In sentencing the defendant on December 17, 1976, Judge McMahon found that the defendant was twenty-one years of age at the time of conviction and eligible for treatment under the Federal Youth Corrections Act, but possibly not able to derive maximum benefit from such treatment prior to its expiration. Accordingly, as to Count 1, no sentence was imposed pursuant to United States v. Mariani, 539 F.2d 915 (2d Cir. 1975); as to Count 2, defendant was committed for treatment and supervision pursuant to 18 U.S.C. §5010(c) for a period of eight years or until discharged by the Board of Parole; and as to Count 3, imposition of sentence was suspended.

Statement of Facts

1. The Offenses Charged in the Indictment

Count One of the indictment, the bank robbery count, charged that on August 30, 1976, defendant and Claxton

robbed the Chemical Bank branch located at 453 East 86th Street in Manhattan (hereinafter referred to as the "Chemical robbery"). Count One charged that the Chemical robbery yielded $19,948 in proceeds.

Count Two of the indictment charged that defendant and Claxton used firearms in committing the Chemical robbery.

Count Three charged defendant and Claxton with using firearms in the commission of a felony.

The Testimony at Trial

1. Commission of the Chemical Robbery

Velma Graham, a teller at the Chemical Bank branch located at 453 East 86th Street, testified at trial that on August 30, 1976, three men entered the bank and one of them pointed a gun at the head teller and then jumped over the counter into the tellers' area. (7a, 8a)* He directed one of the tellers to open the drawer where money was kept and then took the money and placed it into a plastic bag he was carrying. (10a) He then repeated the same procedure with three other tellers, the last of which was Ms. Graham, and then jumped back over the counter onto the bank floor. (11a) While all of this was going on, one of the other two men stood by the door to the bank and the other went to the

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* All references to numbers followed by "a" are to pages of the Joint Appendix.

bank officers' platform. (9a, 10a, 15a). Just before the three men exited from the bank, the one who had jumped over the counter ("the vaulter") stated that no one was to walk in the direction he and his associates were going, because if they did, "they would be in big trouble". (12a)

2. Tentative Identification of Cranshaw as One of The Bank Robbers

Ms. Graham was the only witness the Government used at trial who testified that defendant was the robber who jumped over the counter. Her identification consisted of an in-court identification in which she testified that defendant "looked like" the vaulter and her having picked the defendant out of a photospread of six persons shown to her by agents of the Federal Bureau of Investigation ("FBI") on September 30, 1976. (25a27a; GX9 and 9A, 250a-255a)

On cross examination, it was developed that when the FBI had shown Graham the photospread, she selected two photographs and told the FBI that one of the men depicted therein was the robber who had jumped over the counter. (38a) She finally selected the photograph of the defendant because the vaulter was a young person and the defendant was young and seemingly younger than the individual in the other photograph selected. (39a) Because the vaulter was wearing a cap, wig and dark glasses at the time of the robbery, it was difficult to identify him on September 30, 1976 and

Graham was therefore "not positive" in her identification of the defendant. (42a, 43a)

A second basis relied upon by the Government to attempt to identify the defendant as the vaulter was surveillance photographs taken while the robbery was in progress, which photographs bear little resemblance to defendant. (15a; GX4 and 4A, 246a249a) A third basis was an oral confession the defendant made to FBI agent Samuel M. Wichner on the same day he was arrested (discussed infra).

A fourth method by which the Government attempted to identify the defendant was certain alleged similar acts consisting of bank robberies in Brooklyn (discussed infra).

3. Defendant's Arrest and Interrogation by and Statements to Law Enforcement Officials

John Lyons, a New York City Housing Authority policeman, testified at trial that on October 7, 1976 he arrested the defendant in Brooklyn, New York. (TR111)* Lyons testified that defendant was advised of his constitutional rights and searched. (TR113) Photographs found on defendant's person pursuant to such search included a photograph depicting defendant with an individual named Frank Lewis, who as a result of subsequent statements to FBI agents by defendant, became a suspect in the Chemical

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* All references to numbers preceded by "TR" are to pages of the Trial Transcript.

robbery and other robberies. (TR113; GX13 and 13A, 257a-261a) (see infra.)

FBI agent Samuel M. Wichner testified at trial that in response to Lyon's telephone call, Wichner and another agent travelled that same day to Brooklyn, where they took the defendant into custody and arrested him for the Chemical robbery. (62a, 63a) Wichner advised defendant of his constitutional rights and suggested that defendant cooperate with the federal authorities. (73a)

At FBI offices in Manhattan, Wichner showed defendant a surveillance photograph of the man who jumped over the counter in the Chemical robbery. (80a; GX15, 263a, 264a) Cranshaw identified that person as himself and wrote and signed a statement to that effect on the reverse of the photograph. (81a) He also told Wichner that Frank Lewis was the getaway driver in that robbery. (83a) Lewis was the individual depicted with defendant in one of the photographs found on defendant's person at the time of his arrest. (GX13A, 257a)

Wichner then showed defendant surveillance photographs taken of a robbery which occurred on September 8, 1976 at the Manufacturers Hanover Trust Company bank located at 2084 Linden Boulevard, Brooklyn, New York ("Manufacturers robbery"). (84a) Defendant told Wichner that defendant was

one of the robbers depicted therein. (85a; GX16,265a) Defendant also identified another of the robbers depicted in the surveillance photographs as Lewis. (85a)

A photograph characterized by Wichner as a surveillance photograph of a robbery which occurred on July 29, 1976 at the Prudential Savings Bank located at 418 Myrtle Avenue, Brooklyn, New York was shown to defendant ("first Prudential robbery") and he identified himself as the robber depicted therein. (86a, 87a; GX18, 266a) Defendant told Wichner he committed that robbery by himself. (87a) The reason he gave for committing it was that his mother needed money. (86a) Defendant also told Wichner that he robbed the same Prudential Savings Bank in August 1976 with the assistance of Lewis ("second Prudential robbery"). (88a) Defendant's counsel objected to the introduction into evidence of testimony relating to the above alleged similar acts. (128a-134a, 135a).

Defendant did not call any witnesses at trial.

Point I

THE DISTRICT COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY AND PHOTOGRAPHS RELATING TO TWO OTHER BANK ROBBERIES

A. The Evidence of Defendant's Admissions Relating to the Second Prudential Bank Robbery was Uncorroborated and Therefore Inadmissible

Agent Wichner testified concerning statements made

to him by the defendant in which defendant admitted having committed the second Prudential robbery. (See supra, p. 7) No other evidence in addition to Wichner's testimony was offered with respect to the second Prudential robbery.

Testimony by witnesses other than a defendant concerning extrajudicial admissions by that defendant made after the commission of the crime with which he is charged cannot be accepted into evidence without independent corroboration, Opper v. United States, 348 U.S. 84 (1954); Smith v. United States, 348 U.S. 147 (1954). Such a requirement of corroboration applies not only to a strict confession but to statements that show an essential element of the crime or a fact subsidiary to the proof of such an element, in this case similar acts that presumably are probative as to identity, common plan, motive, opportunity or intent, Opper v. United States, supra; Smith v. United States, supra. The admission of uncorroborated evidence concerning the second Prudential robbery was therefore erroneous and highly prejudicial to defendant; Opper v. United States, supra; Smith v. United States, supra; and see pp. 17-18 infra.

B. The Evidence Relating to the Two Bank Robberies Was Inadmissible Because its Probative Value Was Clearly Outweighed by its Prejudicial Effect

Testimony and a photograph concerning defendant's

admissions with respect to the first Prudential robbery and testimony concerning his admissions about the second Prudential robbery were received into evidence over defense counsel's objection. (See supra, p. 7) In admitting the evidence, the District Court stated:

> "I am going to admit it. I think they are sufficiently related in both sequence, in the time, in the interrelated nature of the operations, on the questions of intent, motive, identity, common plan, opportunity. I think it meets the classic situation where it is admissible; that its probative value does outweigh its prejudicial effect. Surely that is so -- one other robbery is going in anyway. It seems to me that adding two more isn't going to greatly tip the scale as prejudicial. The issue of identity here is so close that I think in the interest of justice it requires the admission of this evidence." (134a)

The District Court's reasoning was incorrect in several respects: first, evidence of the two bank robberies was not probative on the issues stated; second, the prejudicial effect was substantial and was certainly great enough, when weighed against its probative value, to preclude its admission.

The rule in this Circuit with respect to evidence of similar criminal acts is that such testimony is inadmissible to show that a defendant has a criminal disposition, but is admissible if it also reveals a defendant's capacity, habit, plan, knowledge, intent, motive or identity

with respect to the crime for which he is being tried, United States v. Frascone, 299 F.2d 824 (2nd Cir.), cert. denied, 370 U.S. 9[illegible]0 (1962). However, this Court has been careful to emphasize that the mere fact that such testimony may be relevant to identity, motive, etc. is in and of itself insufficient to justify its admission. In all instances when such testimony is offered into evidence:

> "The trial judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudicial character," United States v. Deaton, 381 F.2d 114, 117 (2nd Cir. 1967).

The probative value of testimony relating to both Prudential robberies and the photograph relating to the first Prudential robbery was so insignificant and its prejudicial effect so substantial that the District Court committed reversible error in allowing such testimony and photograph into evidence.

The First Prudential Robbery

The District Court listed a number of issues on which evidence of the first Prudential robbery would be probative, but especially emphasized its value on the question of identity. Yet there was nothing so uniquely similar between the first Prudential robbery and the Chemical robbery that could have assisted the jurors in determining

that one of the individuals depicted in the surveillance photographs taken of the Chemical robbery was the defendant.

The Government candidly stated its reason for wishing to introduce evidence on the first Prudential robbery:

> "[T]he reason is that the surveillance photo on the Prudential Bank robbery which the defendant says he did by himself is a much better and clearer likeness of this defendant than the surveillance photos which are in evidence already as to the other similar acts. That's why it is probative." (133a)

No matter how good the likeness and clarity of the photograph may have been, its probative value on identity in the crime charged was nonexistent since the two robberies were so dissimilar. Balanced against this absence of probative value was the prejudicial effect of the testimony and the photograph. Proof of identity therefore cannot stand as a basis for admitting into evidence the testimony and photograph of the first Prudential robbery. Similarly, proof of common plan is ineffective as a basis for introducing a robbery as dissimilar from the one charged.

The evidentiary link between the first Prudential robbery and the Chemical robbery, as it relates to motive, is similarly tenuous. That the first Prudential robbery was committed in order to obtain money for defendant's mother

was urged by the Government as the basis for an apparently recurring motive to rob banks. (130a, 131a) Yet, except for agent Wichner's brief reference to that motive for committing the first Prudential robbery, there is no evidence whatsoever in the record that suggests that defendant's mother was once again in need of money, thereby providing the defendant with a motive to commit the Chemical robbery. The District Court was therefore incorrect, or at best lacked sufficient evidence, in determining that the first Prudential robbery was probative with respect to motive.

Defendant's alleged "high life style" was put forth by the Government as another basis for the relevance of the first Prudential robbery to the issue of motive. (131a) The evidence in the record tending to show a high life style is limited to the inference of high life style that might be drawn from a photograph of the defendant standing with Frank Lewis in front of a Rolls Royce automobile and to testimony not given in the presence of the jury by Patrolman Taylor, a New York City Housing Authority policeman who assisted Lyons in interrogating the defendant, concerning the clothes defendant was wearing at the time of his arrest and statements by the defendant concerning his

financial well-being. (GX13, 257a; TR174, TR175)* Nowhere in the record does it appear that defendant in fact owned a Rolls Royce, that his clothes in fact were expensive (and not inexpensive copies), or that his legitimate sources of income were inadequate to support his style of life. Moreover, any evidence in the record of a "high life style" is insufficiently probative to show defendant's motive in committing the Chemical robbery. This Circuit has been careful to exclude evidence of similar crimes where the

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* "[TAYLOR]: I asked Mr. Cranshaw, I said 'Those are pretty nice clothes that you have on. What do you do for a living?'

He told me he was a professional musician and he said 'That's what the trumpet is there for.'

He said he was a professional musician and that he didn't have to do any robberies because he had plenty of money. His mother owned a club. He showed me a card that was in his belongings. I don't know if it was a discotheque but some kind of club and that they had money. A lot of other things, little things.

MR. DOYLE: What was the last thing the witness said?

[TAYLOR]: He was saying that he had enough money. He asked me how much money did I make, and stuff like that. He had more money than I do. He said 'This is nothing, what I have on. I got plenty of clothes, I got plenty of money." (TR174, TR175)

chain of inferences that a jury would have to make is too speculative, United States v. Mullings, 364 F.2d 173 (2nd Cir. 1966). In Mullings, the defendant had been convicted of theft and evidence concerning his use of narcotics had been admitted on the issue of motive. The court in Mullings found that admission of such evidence constituted reversible error. In reaching its decision, it stated:

> "There was no evidence how often Mullings took narcotics, or what the maintenance of such a habit would cost him, or that he was unable to obtain narcotics because of a shortage of money. In effect, the evidence only shows that he might have lacked money and therefore might have had a motive to commit the crime--from which the judge inferred that he did so. We think this is too remote; the need for money being speculative the motive can be no better." 364 F.2d at 175-176. (Emphasis in original)

As noted above, the evidence in this case concerning defendant's alleged high life style at best suggests, and clearly does not prove, that it could be maintained only by resorting to the robbing of banks. Thus, high life style is an insufficient basis for establishing the admissibility of evidence concerning the first Prudential robbery.

A basis offered by the Government for admitting the evidence was that it was probative of "opportunity to the extent that the man is experienced in robbing banks". (131a) The danger of so potentially broad an exception to the similar acts rule is obvious -- opportunity becomes

virtually indistinguishable from propensity to commit robberies. Evidence relating to experience could conceivably be probative in a case where a defendant's possible inability to commit a crime, due to age, inexperience or mental defect, was at issue. Clearly, that is not the case here; consequently, an "opportunity" justification for admitting testimony concerning the first Prudential robbery must be rejected.

Another basis for admitting the evidence cited by the District Court was "intent." It is difficult to imagine how committing the first Prudential robbery evidences intent to commit the Chemical robbery unless one concludes that once a person begins robbing banks, he intends to keep robbing banks, the precise conclusion the similar acts rule attempts to protect against.

A possible basis for introducing evidence relating to the first Prudential robbery was offered by the Government at trial as follows:

> "In addition the very same bank that he says that he robbed by himself at the end of July, he then says he robbed again a few weeks later with Frank Lewis. So the two robberies tie in. The man robbed, he says, to the FBI the same bank within a period of weeks. He knew that bank and that bank goes to help establish that he robbed that bank the second time with Frank Lewis and that goes to establish that he robbed the bank that's charged in the indictment." (131a)

Which of the recognized exceptions to the similar acts rule is being alluded to in the above paragraph is difficult to determine. However, while robbing the same bank twice might be relevant to issues raised in connection with a third robbery of that bank, it would not appear especially probative with respect to a different bank. What seems clear, therefore, is that any link between the first Prudential robbery and the Chemical robbery is tenuous at best. Reliance on the second Prudential robbery as an effective link is misplaced (see discussion infra). In any event, the total probative value of testimony and photographs relating to the first Prudential robbery on points at issue in the robbery charged was inconsequential. In contrast, its prejudicial effect was substantial. The defendant had been portrayed to the jury as a high living, experienced bank robber who had robbed a bank only one month prior to the robbery charged. Thus, under these circumstances, the District Court could not properly have determined that the probative value of evidence relating to the first Prudential robbery outweighed its prejudicial effect; admission of such evidence was an abuse of discretion and constituted reversible error, United States v. Mullings, supra; see United States v. Byrd, 352 F.2d 570 (2d Cir. 1965).

The Second Prudential Robbery

Agent Wichner testified that the defendant admitted committing the second Prudential robbery with the assistance of Frank Lewis. (See supra, p. 7) No surveillance photographs of that robbery were offered into evidence. No evidence of Frank Lewis' participation in any robbery was offered except by way of Agent Wichner's testimony concerning the defendant's admissions which implicated Lewis as a participant in the second Prudential, Chemical and Manufacturers robberies. (83a, 85a, 88a)* No evidence received at trial showed that as between the second Prudential robbery and the Chemical robbery there was "a common scheme or plan embracing commission of two or more crimes so related to each other that one [tended] to establish the other," United States v. Wiggins, 509 F.2d 454, 462 (D.C.Cir. 1975); Drew v. United States, 331 F.2d 85, 90 (D.C. Cir. 1964). Moreover, testimony concerning the defendant's and Lewis' participation in both robberies came from the mouth of the same witness -- Wichner. If the jury believed Wichner's testimony as to the Chemical and Manufacturers robberies, the relating by Wichner of defendant's admissions

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* Wichner testified that the defendant identified one of the robbers depicted in a surveillance photograph taken during the Manufacturers robbery as Frank Lewis (85a) The poor quality of the photograph made it of no probative with respect to Lewis without Wichner's testimony concerning defendant's identification.

concerning the second Prudential robbery added little, if anything, with respect to the issues as to which the testimony was allegedly probative. Admission by the District Court of evidence of such small probative value and potentially substantial prejudicial effect constituted an abuse of discretion, United States v. Byrd, supra; see United States v. Johnson, 382 F.2d 280 (2d Cir. 1967).

Point II

THE JUDGMENT OF CONVICTION AS TO ALL COUNTS MUST BE REVERSED BECAUSE OF THE SUBSTANTIAL PREJUDICE TO THE DEFENDANT ARISING FROM THE DISTRICT COURT'S CHARGE OF JOINT VENTURE OR COMMON PLAN

In its charge, the District Court informed the jury that a defendant could be found guilty on a count in the indictment if they found beyond a reasonable doubt that he had committed each act or element charged with respect to such count or if he had aided or abetted another in the commission of said acts. (210a-219a) Both the substantive crimes and aiding and abetting were charged in the indictment so that this charge was proper.

However, the District Court continued in its charge and added a third method by which the jury could find the defendant guilty:

"There is yet another basis upon which you may convict the defendant whom you are considering on any of the counts charged in this indictment. When several people enter into an agreement to commit a crime, they form a joint or common criminal venture or plan. They enter into a partnership in crime. And once a defendant knowingly joins such a joint criminal venture or plan, he is responsible for the acts of every other member or partner in the joint criminal venture or plan, provided those acts were foreseeable and provided further that they were committed after he joined the common plan and in furtherance of the purposes of the joint criminal plan." (221a)

Later in its charge, the District Court once again reminded the jury that joint criminal plan or conspiracy constituted a separate basis upon which to find defendant guilty:

"You should consider each of the counts and each defendant separately. You should render a verdict of guilty as to the defendant whom you are considering on the count which you are considering if you find that the government has proved beyond a reasonable doubt any of the following:

1, each of the elements of the crime charged in that count as I have given them to you; or

2, that the defendant aided or abetted others in the commission of the crime charged in that count; or

3, that the defendant was a partner in a joint criminal plan or venture and that any other member or members of the same joint criminal plan or venture committed the crime charged in furtherance of the purposes of the joint criminal venture and that the act was foreseeable and committed after he joined in the common plan.

If you find any of these three things then you should render a verdict of guilty on that count as to that defendant." (229a, 230a)

Defendant's counsel excepted to the District Court's charge. (233a)

A. The Court's Charge on Joint Venture was an Unconstitutional Addition to the Indictment

The indictment under which defendant was tried contained three counts, none of which charged defendant with joint venture or conspiracy. The District Court's charge to the jury on an element or count not contained in the indictment constituted reversible error, Stirone v. United States, 361 U.S. 212 (1960); see United States v. Silverman, 430 F.2d 106, 112 (2nd Cir. 1970), cert. denied, 402 U.S. 953 (1971).

In Stirone, the indictment charged the defendant with extortion relating to "certain supplies and materials [sand]" that moved in interstate commerce. The district court judge charged the jury that with respect to the interstate commerce aspect of the case, Stirone's guilt could be based upon either a finding that sand had been shipped interstate or that the ready mixed concrete in which the sand was used was in turn used to construct steel mills in which steel products were manufactured and then shipped out of state. The Supreme Court reversed Stirone's conviction on the grounds that a defendant cannot be tried on charges that are not made in the indictment against him. The Court stated:

"The very purpose of the [5th Amendment] requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge" 361 U.S. at 218.

The jury in the instant case was informed by the District Court that they could convict the defendant if they found that he was a partner of a joint criminal venture, one of whose foreseable purposes was to commit the robbery charged. Thus, defendant's conviction on each of the three counts charged in the indictment could have been based upon the jury's finding that he had been a member of a joint venture to commit the Chemical robbery. Under such circumstances, where it is impossible to determine the basis for a jury's guilty verdict, and one possible basis therefor is an improper theory of criminal liability, the conviction must be reversed, Mills v. United States, 164 U.S. 644, 649 (1897); Nicola v. United States, 72 F.2d 780, 787 (3rd Cir. 1934); Yates v. United States, 354 U.S. 298, 312 (1957).

B. The Court's Charge on Joint Venture Was Given Without Any Advance Notice to the Parties, Thus Unfairly Permitting the Jury to Consider a Theory of Liability Not Addressed in the Summations

Neither the Government nor defense requests to charge contained reference to the vicarious liability of a coventurer for substantive offenses committed pursuant to

the joint venture. The summation of counsel for defendant dealt exclusively with, and the summation of the Government as to defendant focused in large part on, the key issue of the identity of the vaulter at the Chemical robbery: Was it defendant or was it not? (166a-193a)

It was thus devastating to defendant's case for the trial Court, without advance notice, to submit to the jury a theory of vicarious liability that would have permitted them to convict defendant even if they failed to find that he was present at the Chemical Bank robbery on the theory that as a member of a joint venture he would be liable for the acts of his co-venturers in robbing the Chemical Bank. Not only had counsel for defendant based his entire defense on the argument that the Government had not proven that defendant was the vaulter at the Chemical robbery; he had also emphasized to the jury that the Chemical robbery was the only one before them for adjudication. (175a, 176a) Defendant's counsel made little if any attempt to cast doubt on the evidence tending to identify defendant as a participant in the other bank robberies.

Therefore, the summation on defendant's behalf was seriously undermined by the Court's unexpected charge as to the vicarious liability of a coventurer. Under this portion

of the charge, the jury would have been able to find defendant guilty on all three counts even if he had not been present at the Chemical robbery. All that would have been required was for the jury to find that at the time of the Chemical robbery a gang of bank robbers existed of which defendant was a member, and that the Chemical robbery was a foreseeable objective of the gang. Had defendant's counsel known that this theory of liability was to be presented to the jury, he could have tried to negate it by arguing that the Government had failed to prove that defendant was involved in any of the robberies proven as similar acts.

Although Rule 30, F.R. Crim. Proc., explicitly requires only that the trial judge advise counsel prior to his argument to the jury of the Court's proposed action on counsel's requests to charge, it is clear that the Court cannot properly introduce a novel theory of liability without notifying counsel of its intentions before summations take place, see United States v. Bass, 425 F.2d 161, 163 (7th Cir. 1970); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974); United States v. Mendoza, 473 F.2d 697, 701 (5th Cir. 1973); Loveless v. United States, 260 F.2d 487 (D.C. Cir. 1958).

In United States v. Fincke, 437 F.2d 856 (2nd Cir. 1971), a case in which the trial Court entered a judgement of acquittal as to one defendant after summations on behalf of all three defendants had been given, this Court stated:

> "For the theory generally applicable to trials, civil as well as criminal, especially since the adoption of the Federal Rules of Civil and Criminal Procedure, is to let counsel know in advance of the summations the rulings to be made in the instructions to the jury... [citations omitted] ... This is generally accomplished by colloquy or by rulings on requests for instructions prior to the summations." 437 F.2d at 858

Inasmuch as notice to defendant of the issues in the case is fundamental to a fair trial, and the charge on joint venture deprived defendant of that right, the charge was reversible error and defendant should be granted a new trial.

CONCLUSION

The judgement of conviction should be reversed and the case remanded for a new trial.

Respectfully Submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT
SECOND SCIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** - *against* - **KIM CRANSHWW,** **Defendant-Appellant.**	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 310 West 146th Street, New York, New York,

That on the [redacted] **10th** *day of* **Feb.** *19* **77** *at* **One St. Andrews Plaza New York, N.Y.**

deponent served the annexed **Appendix x Brief** *upon* **U.S. Atty. - So. Dist. Robert Fiske, Jr.**

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **10th** *day of* **February,** *19* **77**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
Print name beneath signature
JAMES A. STEELE